BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNIE E. LOWE	)	
Claimant	)	
VS.	)	
	)	Docket No. 172,288
MONFORT, INC.	)	
Respondent	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent, its insurance carrier, and the Kansas Workers Compensation Fund (Fund) appeal from the September 24, 1998 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on April 28, 1999.

APPEARANCES

Claimant appeared by Mark E. McFarland of Garden City, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry J. Malone of Dodge City, Kansas. The Fund appeared by its attorney, Douglas M. Crotty of Garden City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations listed in the Award by the Administrative Law Judge.

ISSUES

The Administrative Law Judge found the Fund liable for claimant's 31.25 percent work disability based upon a finding the claimant was a handicapped employee and respondent's knowledge of claimant's handicap was presumed because of

misrepresentation.[1] The Fund appeals that finding. Also, the respondent and the Fund both raise the following issues for determination by the Appeals Board:

(1) Whether the bills of Dr. McMillan and the Veterans Administration should be paid as authorized medical expenses.

(2) What is the nature and extent of the claimant's disability, if any?

(3) Whether the defense provided in K.S.A. 44-501(c) is applicable.

Furthermore, the Fund contends it was denied its right to a fair hearing and due process of law by the reassignment of this case to Judge Avery and, in addition, argues for a credit pursuant to K.S.A. 44-510a against any award assessed against the Fund.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award entered by the ALJ should be affirmed.

The Award of the ALJ sets out his findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Appeals Board finds them to be accurate and adopts the findings and conclusions of the ALJ as its own as if specifically set forth herein. The Appeals Board would, however, change the finding in the last sentence of paragraph V, regarding temporary total disability compensation, to read that since the record fails to substantiate that claimant was temporarily totally disabled for more than one week, temporary total disability payments are denied. Additional temporary total disability compensation was not made an issue for review, but this is intended to also clarify the holding concerning the K.S.A. 501(c) issue. On this issue the Appeals Board would also point out that claimant returned to work at an accommodated job. The fact that his permanent restrictions for this injury would prevent him from returning to "the work at which the employee is employed" is another reason the so-called Boucher[2] defense is inapplicable.

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[1] K.S.A. 1992 Supp. 44-567(c).

[2] Boucher v. Peerless Products, Inc., 21 Kan. 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996); *see also* Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. ___ (1997).

The Fund argues claimant did not consider himself to be an impaired worker. The Appeals Board disagrees. Not only had claimant been given restrictions for injuries suffered before he applied for work with respondent, but claimant had even applied for social security disability benefits. This shows claimant had serious concerns about his ability to work. Nevertheless, he failed to share those concerns with the respondent. The Appeals Board agrees with the ALJ that respondent has sustained its burden of proof that claimant was a handicapped employee and had misrepresented his condition to respondent before this accident.

The terminal date for receiving evidence was April 21, 1998. But additional evidence was thereafter submitted by the Stipulation of the parties filed September 14, 1998. No submission letter pursuant to K.A.R. 51-3-5 was filed until September 18, 1998 when claimant sent his letter to the office of the Administrative Law Judge in Garden City, Kansas. On September 23, 1998 the Director issued an order pursuant to K.S.A. 44-523(c) assigning this case to Administrative Law Judge Brad E. Avery for a decision. As stated above, the Award was issued on September 24, 1998.

The Fund contends that the transfer of this case to Judge Avery and his ruling "without allowing the Respondent or the Fund to respond to Claimant's Submission Letter by a Submission Letter of their own constitutes error under K.S.A. 44-523(c)." First, Judge Avery apparently did not consider the claimant's submission letter. At page 5 of his Award, Judge Avery states that he "did not have the benefit of briefs from **any** of the parties." (Emphasis added.) Second, the parties were given a reasonable opportunity to be heard and to present evidence. The parties had, in effect, five months to submit their arguments in writing but failed to do so. There is no requirement that an ALJ wait any certain number of days for submission letters, nor is there any provision in the Act that gives a respondent or the Fund any certain length of time to respond to a claimant's submission letter. There is no allegation that the ALJ failed to act reasonably without partiality.[3] Finally, review by the Appeals Board is de novo.[4] This appeal has provided respondent and the Fund another opportunity to brief the issues and to present argument. Any prejudice that might have occurred has now been rendered moot.

As for the K.S.A. 44-510a credit the Fund now seeks, the Appeals Board finds there is insufficient evidence in the record to determine what, if any, credit may be due.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery dated September 24, 1998,

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[3] K.S.A. 44-523(a).

[4] K.S.A. 44-555c(a); Rios v. Board of Public Utilities of Kansas City, 256 Kan. 184, 883 P.2d 1177 (1994); Helms v. Pendergast, 21 Kan. App. 2d 303, 899 P.2d 501 (1995).

should be, and is hereby, affirmed in all respects, and the orders contained in the Award are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. McFarland, Garden City, KS
Terry J. Malone, Dodge City, KS
Douglas M. Crotty, Garden City, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director